

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1307

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

HARVEY S. MEYERS,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

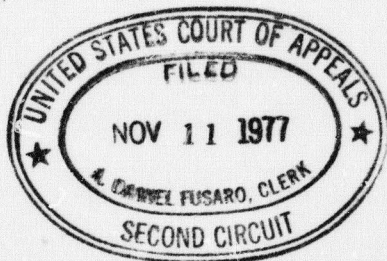
STEIN ROSEN & OHRENSTEIN
Attorneys for Defendant-Appellant
1370 Avenue of Americas
New York, New York 10019
(212) 489-0220

Of Counsel:

MANFRED OHRENSTEIN

On the Brief:

MARC R. LEVENTHAL
LEWIS M. LEFKOWITZ





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APPELLANT'S REPLY BRIEF

Preliminary Statement

Appellant will limit his reply herein to the arguments raised in the Brief for the United States of America (hereinafter "Government Brief") in the above captioned appeal of the conviction of Defendant-Appellant, Harvey S. Meyers, on two counts of income tax evasion. Accordingly, Appellant respectfully refers this Court to his Appellant's Brief, wherein the record of the Trial Court below is closely analyzed and the Appellant puts forth fully his arguments for reversal.

We will deal with the legal issues, *infra*. At this point certain factual misstatements by the Government need correcting solely because of the seeming importance the Government places thereon. At pages 5, 7 and 16 of the Government Brief it is stated that the "correct", "convenient" and "precise" amount of the Defendant's gross commissions for the year were reflected on twelve forms

"600", which the Defendant never turned over to his accountant. This, the Government alleges, among other things, proves that the defendant intentionally withheld information from his accountant. What the Government fails to state is that the Defendant would not ordinarily be in possession of these forms, nor did the Government ever prove that he received them. That is the import of the cross-examination of one of the Government's witnesses, Henry Klaassens, Comptroller of the New York Stock Exchange:

"Q. Are any copies of these forms [Form 600] returned to the member?

A. No, no copies are returned to the member."
[324A]

Additionally, at page 7 the Government states that the Meyers-Fernandez loan was made "for some unexplained reason". It has been precisely the point of the Appellant, at Point III of his Appellant's Brief, that nothing surrounding this loan and its alleged repayment was ever allowed to be explained to the jury because of the Trial Court's erroneous rulings.

POINT I

Characterization of the Bad Debt Deduction Was Improperly Admitted Against Defendant.

It is clear and uncontroverted that the Defendant's character was not in issue at this trial. Yet, the Government again and again attempted to impugn his character. The Government repeatedly urged upon the jury that the Appellant deliberately and with intent converted a personal bad debt deduction to a more advantageous business deduction; that he wrongfully altered a check; that he took

the same dinner expense deduction in two different years. And none of this was left idly in the evidence to be weighed. The Government, quite effectively, highlighted these elements of proof in its summation to the jury for purposes quite apart from the strictly limited showing of intent to defraud allowed by Section 404(b) of the Federal Rules of Evidence.* All this is amply demonstrated in Point II of Appellant's Brief. Accordingly, the conduct of the prosecution below ran contrary to the carefully established protections of Section 404(a) of the Federal Rules of Evidence.

A. The Trial Court should have employed a weighing test.

Where problems of prejudice are raised the admission of evidence for the purpose of showing intent must be subjected to a deliberate and meaningful weighing test to be conducted by the trial judge. On this, both the Appellant's Brief and the Government Brief agree (Appellant's Brief p. 15; Government Brief p. 22). Having agreed, the Government then misses the whole point of just what is the clear prejudice as defined by Point II of the Appellant's Brief. The Government, at p. 20 *et seq.* of its Brief, argues that the facts regarding the Fernandez transaction (the \$25,000 loan and its alleged repayment) were required in evidence to prove intent regarding the failure to report 1972 income. Appellant does not quarrel with that proposition. However, the Government went further and introduced evidence concerning the characterization of the bad debt deduction in connection with this transaction. This went beyond the notions of fairness developed by the

* The Government conveniently forgot about its summation in its footnote at pp. 22-23 of the Government Brief, in an attempt to limit the prejudice. Moreover, despite what is claimed in said footnote, the Government, in fact, did *not* use the bad debt characterization to show a "special awareness" of tax matters, nor is that what it told the Court it wished to use it for, upon the Court's inquiry (192A-193A).

Federal Courts. The Government even states, at p. 21 of its Brief, that it is "*entitled* to prove all of the surrounding circumstances of the loan in order to make out its case in chief." (Emphasis supplied) Its case in chief was made well before it began to misuse the Fernandez transaction and engendered fatal prejudice. This is precisely the reason the Courts employ a weighing test, even for evidence which may be directly relevant.

The Government's case in chief was made by introduction of evidence tending to show that (a) a bad debt deduction had been taken on the 1971 return; (b) Fernandez had repaid the loan in 1972; and (c) Appellant willfully failed to report the repayment as income on the 1972 return. There was no need for the Government to add additional evidence concerning the characterization of the bad debt deduction as personal or business, particularly where, as noted in Point II of Appellant's Brief at pp. 21 and 31, Fernandez himself had treated the loan as one to his company. The exhibits introduced by the Government (Ex. 11-13 [565A-567A], 16-17 [570A-571A], 28-30 [575A-577A]) coupled with the Fernandez testimony, if believed, should have been ample on intent for the Court to have intervened and said: no more.

The characterization of the 1971 deduction had, at best, only tangential relationship to the issue of Appellant's intent to defraud the Government by failing to report as income the alleged repayment of the loan in 1972. The cumulative effect of the repeated testimony concerning the characterization of the deduction could only have served to confuse the minds of the jury. The Government's attempts to obscure the relevant issues are continued in its Brief where it terms everything as the "Fernandez transaction", and where it conveniently lumps the elements necessary to prove a failure to declare \$25,000 of income *in 1972*

[(a) (b) and (c) above] with the characterization of the deduction in 1971. It is the irrelevance and prejudicial impact of the latter which we trust this Court will find requires reversal of the verdict below.

Point II of Appellant's Brief clearly shows how the Court below employed no weighing test at all of probative value of evidence as it related to intent versus prejudice. Therefore, Appellant submits that this Court need not even embark upon any tests of arbitrariness or irrationality as found in the case law placed before it.

If the Trial Court did do any weighing, it did so in that previously noted colloquy with the prosecution (192A-193A) (Appellant's Brief, pp. 18-19). Virtually all that was required was for the Government to say that they were using the characterization of the bad debt deduction to show intent, and the Court terminates its weighing test even before it starts. The cases cited below, all of which are also set forth by the Government, clearly require much more in the way of a true weighing. *United States v. Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975); *United States v. Braunig*, 553 F.2d 777, 781 (2d Cir. 1977); *United States v. Robinson*, 560 F.2d 507, 514 *et seq.* (2d Cir. 1977).

In affirmance of a conviction for income tax evasion in *Leonard*, this Court explicitly stated, with reference to the admission of "similar act" evidence, that the Court must question the value of that evidence as against its cost. *Braunig* demonstrated just how far the trial courts will go in living up to their duty to weigh, in that the trial judge there held a hearing prior to trial on the similar act evidence in question.

Lastly, *Robinson* appears to be a watershed case, although it is of quite recent vintage, for its careful discussion of the weighing test. In an appeal heard *en banc* on

rehearing, after the conviction below was reversed by a three judge panel, this Court, per Judge Mansfield, affirmed the conviction of the Defendant for bank robbery. The issue that arose was whether evidence was admissible that showed that at the time of the Defendant's arrest (ten weeks after the robbery with which he was charged), he was in possession of a .38-caliber revolver, after an accomplice had already testified that the Defendant was in possession of a .38-caliber revolver at the time of the robbery. The Government put forth this evidence as relevant to the issues of identification and opportunity. Circuit Judge Mansfield, quite properly, accorded "broad discretion" to the trial court to weigh the probative value of the gun-at-arrest evidence against its prejudicial effect. The trial judge's exercise of discretion will be upheld "unless he acts arbitrarily or irrationally." In matching the actions, or lack thereof, of the trial judge here as against the careful efforts of Judge Bryan, the trial judge in *Robinson*, one can only envy the care with which prejudice was considered in *Robinson*, and this Appellant deserves no less. Apparently, the Second Circuit felt that *Robinson* was the epitome of a weighing test, as well, in stating at 515-516:

"Applying the arbitrary-irrational standard for abuse of discretion to the present case, Judge Bryan's ruling clearly must be upheld. He *carefully* considered arguments of counsel and weighed the competing interest before admitting the evidence of Robinson's possession of the .38-caliber gun upon arrest. In line with suggestions made by us in *United States v. Leonard, supra*, at 1092, he delayed submission until virtually all of the other proof had been introduced, by which time he was in a better position to weigh the probative worth of the evidence against its prejudicial

effect. Although there were competing considerations, it was neither unreasonable nor arbitrary to conclude that a sound basis existed for a probative inference to be drawn from the evidence which outweighed its prejudicial effect." (Emphasis supplied)

We submit that the record is barren of any attempt by the Trial Court in this case to make this kind of careful determination.

B. The Trial Court failed to give limiting instructions to the jury.

Even had the evidence as to the type of bad debt deduction been admitted for the narrow purpose of showing intent, the record is devoid of any limiting instructions either during the course of the trial or in the Court's charge to the jury. The Trial Court lost sight of the limited purpose of such evidence, and therefore lost control of the trial itself to the conclusion of the jury and the ultimate prejudice of the Defendant.

It is interesting to note that the Government, in its Brief at p. 15, cites *United States v. King*, 560 F.2d 122 (2d Cir. 1977). Once again the Government puts forth another case wherein the Government's evidence relating to intent was accepted by the trial court. What this case really shows is how careful the Federal District Courts of this Circuit are with evidence admitted for a limited purpose. In *King*, Defendants were convicted of securities fraud, mail fraud, wire fraud, and conspiracy to commit such offenses. Judge Frankel, the trial judge there, admitted into evidence certain information suggesting the Defendants' motive for the crimes charged. This Court noted with approval, at 133:

"The evidence objected to was *carefully limited* by the Court to the question of motive to the allegedly

sham sales to Mecom and COG, and the jury was *instructed* to consider it as showing that CRC fraudulently overpriced its own sales to FOF. Appellants insist that, nevertheless, the evidence was highly prejudicial because it lead the jury to consider them "bad men" who simply ought to be punished for milking FOF through high prices. We cannot accept this complaint. The information was highly relevant to the case; it explained why Appellants would do what they were said to have done. The prosecutor's summation stressed KRC's financial interest but he tied it directly to the Mecom and COG sales as showing the motive why they were planned. *Above all, the Court kept the jury on the track in its instructions, in a specific direction as the evidence came in, as well as in the final charge.*" [Emphasis supplied] (Also see *United States v. Braunig, supra* at 781.)

C. Appellant's trial counsel did not waive Appellant's rights.

The Government asserts that, even granting all of the foregoing, the defense counsel at trial did not object properly and in timely fashion to the Court's actions which are the subject of this appeal. The Government claims, at pp. 20 and 24 of its brief as it relates to the characterization of the bad debt, and at p. 26 as it relates to the judge's restraint of defense counsel's questioning relating to the alleged repayment of the Fernandez loan, that defense counsel did not shout loudly enough and quickly enough, i.e., he waived the issues urged on appeal, and that therefore only plain error will warrant a reversal. These issues on appeal, as developed in Points II and III of Appellant's Brief, and as to which the Government claims waiver in Points II and III of its Brief, will be discussed together here as analogous situations, as treated by the judge at trial and as covered by the relevant law. The Court ruled

quickly and firmly in both the instance of admitting evidence characterizing the bad debt (192A-193A) (Appellant's Brief pp. 18-19) and in cutting off defense counsel's questioning of defendant's wife as such testimony related to the alleged repayment of the Fernandez loan (372A-373A) (Appellant's Brief pp. 34-35). The trial judge did so in the very first instance, albeit hastily, with the reasoning clearly displayed in the record. The former was admitted to show intent, and the latter was excluded as irrelevant. We contend these actions were erroneous and Rule 51 of the Federal Rules of Criminal Procedure clearly did away with the requirement that exceptions were required to objectional rulings.

The cases cited by the Government for the proposition that the Appellant clearly waived relate to charges to the jury (Government Brief, p. 20) and not to instances where erroneous rulings are at issue. These cases follow quite naturally from Rule 30 of the Federal Rules of Criminal Procedure, i.e., charges not requested or objected to are deemed waived. Only *United States v. Braunig, supra*, is a case that does *not* involve waiving of a request to charge, and that case cites Rule 12(f) which relates to defenses and objections to be made *before* trial, which is not at issue here.

Not only are the Government's cases inapposite, but the law is to the contrary. In reversal of a tax evasion conviction for unobjected to remarks of the prosecutor, where-in there were also no requests or instructions, the Fifth Circuit noted, in *Benham v. United States*, 215 F.2d 472 at 474 (1954): "It sometimes becomes the duty of the trial judge to stop counsel's discourse without waiting for an objection. *Viereck v. United States*, 318 U.S. 236, 248, 63 S.Ct. 561, 87 L.Ed. 734; *DeBonis v. United States*, 6 Cir., 54 F.2d 3, 5." In the case at bar the Trial Court did just

that with respect to the characterization of the deduction, and no objection was required.

D. The failure of the Trial Court to give a limiting instruction or charge constituted plain error.

Appellant concedes that trial counsel did not request limiting instructions or a charge regarding the matter at issue. We contend, however, that there was plain error when the trial court failed to give such instructions or charges.

The facts have already been meticulously and fully presented to this Court. It is always a difficult and subjective case by case examination, which appellate courts have repeatedly undertaken, to determine whether "fundamental error" affected the "substantial rights" of the criminal defendants, so as to comprise plain error.

Looking first to the claim of the Government that Appellant requested no charges relating to the limiting of the Government's evidence on intent, the law is replete with cases applying Rule 52(b) of the Federal Rules of Criminal Procedure in reversing a criminal conviction because of plain and fundamental error in the charges, even absent a request or objection. *Miller v. United States*, 120 F.2d 968, 972 (10th Cir. 1941); *United States v. Harris*, 331 F.2d 185 (4th Cir. 1964); *Bearden v. United States*, 320 F.2d 99, 103 (5th Cir. 1963); *Polansky v. United States*, 332 F.2d 233, 235-6 (1st Cir. 1964); *Jackson v. United States*, 348 F.2d 772, 774 (D.C. Cir. 1965); *United States v. Harman*, 323 F.2d 650 (4th Cir. 1963).

In *Miller*, at a time when exceptions were still required in the law, the Court nevertheless reversed the conviction for mail fraud, because of the failure to properly charge as to the character and circumstantial evidence testimony

that was admitted, and adversely affected the substantial rights of the Defendant. As the Court stated at 972:

"Two of the Defendants requested no instruction on character testimony, and none of them excepted to the instruction given by the Court. Their failure in this respect does not, however, preclude us from examining the instruction. Where life or liberty is involved, an appellate court may notice and correct a serious error plainly prejudicial, without it being called to the attention of the trial court [citations omitted], or even where the error was not preserved for review by proper objection, exception or assignment. [citation omitted]"

In *United States v. Harris* the prosecutor was ultimately given much less leeway than was present in the case at bar. The Fourth Circuit reversed a conviction of removing, depositing and concealing non-tax-paid whiskey because of the introduction of testimony as to the reputation of the Defendant as a "liquor law violator on a large scale". That Court found this to be substantial error, even though in *Harris* the Defendant actually took the stand. Thus, the Government should have been given greater latitude to attack credibility and establish intent. More significantly, it was not the admission of this evidence that was the grounds for the reversal by the Fourth Circuit. Rather, it stated at 188-189:

"Even though the Defendant failed to object to the charge or to request the Court to instruct the jury correctly, the error, compounding erroneous admission of the evidence, so clearly affects substantial rights of the Defendant as to require notice by us. F.R. Crim.P. 52(b)."

Plain error in the giving of charges or the failure to give proper charges has found a secure home in the Second Circuit as well. *United States v. O'Connor*, 237 F.2d 466 (2d Cir. 1956) concerned the reversal of a tax evasion conviction. This Court held that the standard announced by the Supreme Court in *Holland v. United States*, 348 U.S. 121, was applicable, and, therefore, the charge given at the trial was insufficient for failure to include a summary of the nature of a net worth method of proof. No one asked for that charge. After dutifully citing Rule 30 of the Federal Rules of Criminal Procedure, Judge Waterman, writing for the Court, stated at 472:

"But in criminal cases, Federal Appellate Courts have sometimes noticed errors to which no proper objection has been taken 'if the errors are obvious or if they otherwise seriously effect the fairness, integrity or public reputation of judicial proceedings.' The Federal Rules of Criminal Procedure have not abolished this inherent power."

In *United States v. Pugliese*, 346 F.2d 861, 862 (2d Cir. 1965), in reversing, the Court held that a narcotics prosecution instruction as to the Defendant's burden of proof with reference to being induced into criminal activity was *misleading* and *confusing* to the jury. Therefore, even absent those points being raised in timely fashion at trial, plain error was found. See also, *United States v. Hines*, 256 F.2d 561 (2d Cir. 1958).

Nor should the Government take comfort in the fact that Judge Briant might have conducted a generally good trial. The Courts have been meticulous to establish that even minor errors might constitute plain error. In *United States v. Singleton*, 532 F.2d 199 (2d Cir. 1976), this Court reversed a conviction for possession of stolen mail. There

the trial court commented that it was "clear" that checks were recently stolen and failed to separately and distinctly charge and explicitly warn that the jury must find that the checks were indeed stolen by the defendant. Even though the Court surmised, at 207, that this was probably an "unfortunate, inadvertent slip of the tongue" on the part of the trial court, it was nevertheless fatal, "notwithstanding the lack of objection below".

E. The Government's misuse of "intent" evidence in examination of witnesses and summation constituted plain error.

Moving now to the conduct of the prosecutor, the Courts, here too, have acted quickly to find plain error where they sense unfairness. They have done so for the opening argument of a tax evasion case. *United States v. Signer*, 482 F.2d 394, 400 (6th Cir. 1973). They have done so for the summation of the prosecution. *Benham v. United States*, *supra*, at 473-4. Appellate tribunals have traditionally stepped back, looked at the entire canvass as drawn by the prosecution, especially as finally pulled together in closing arguments, to determine just how pervasive the prejudice was. Objections and waivers have little to do with this process. "Absence of proper objection to excessively zealous prosecution does not prevent our taking notice of the impropriety of such excesses." *United States v. Graham*, 325 F.2d 922, 928 (6th Cir. 1963), citing *Viereck v. United States*, 318 U.S. 236, 247-248 (1943). Similarly, *United States v. Fernandez*, 496 F.2d 1294 (5th Cir. 1974); *Wagner v. United States*, 263 F.2d 877, 882-884 (5th Cir. 1959); *Ginsberg v. United States*, 257 F.2d 950, 954-955 (5th Cir. 1958). Also see, for example, *San Antonio v. Timko*, 368 F.2d 983, 986 (2d Cir. 1966).

The *Fernandez* case was clearly a situation in which, if the Courts were going to apply a doctrine of waiver at all,

they would have done so there. Yet the Fifth Circuit reversed a conviction of possessing, forging and uttering United States Treasury checks stolen from U. S. mails. In the prosecutor's comments in his final argument to the jury, wherein he discusses that particular Defendant's prior criminal record, the trial judge failed to give limiting instructions as to the proper function of that type of evidence. Neither was any requested. Nor were any objections to instructions made by defense counsel. There were no interruptions made by defense counsel during prosecutor's summation. In point of fact, defense counsel there did even less than defense counsel here. Nevertheless, the Court there stated at 1302:

"The prosecuting attorney's argument below is difficult to distinguish in harmful effect from the argument we found to constitute 'plain error', even in the absence of objection in *United States v. Garber*, 5 Cir. 1972, 471 F.2d 212, 217.

"There, as here, it was improperly argued to the Defendant's prejudice that evidence of prior convictions showed the propensity or disposition of the Defendant on trial to commit the offense charged. There, as here, the argument was reiterated and persisted in by the prosecutor and similarly, no objection was voiced.

Appellant respectfully concludes that in this case an even greater prejudicial abuse has occurred, wherein a prosecutor went beyond the fundamental rules of fairness and had no right to allude to his "badges of fraud" to show the character of the Defendant in a case where the Defendant did not even take the stand to testify.*

* We respectfully submit that the prejudice to the Appellant by the admission of this evidence, the failure to properly instruct the jury thereon, and the failure to allow the Appellant to present

POINT II

It Was Error to Prohibit Defendant From Developing a Defense Relating to the Fernandez Loan.

The primary cornerstone of a fair trial must be evenhandedness. Whatever degrees of prejudice this Court assesses in any given ruling or piece of evidence, however damaging or harmless, it should not do so in the abstract. This Court is already well acquainted with the record below and the points from which an appeal has been taken through the Briefs of Appellant and Government. Appellant wishes to take this last opportunity to query how it can be anything but inherent prejudice for the Government to be given wide latitude without limitation, as to the admission of evidence allegedly going to intent, whereas Defendant is accorded no latitude at all in its questioning relating to the alleged repayment of the Fernandez loan, regardless of the weight that may have been entitled to.

The Government thought that the form of the repayment of the Fernandez loan was important enough to state at p. 16 of its Brief:

“ . . . [D]efendant's obvious attempt to conceal the monies owing back to him from the Fernandez transaction—by causing repayment in checks made payable to his wife and daughter . . . invited the justified conclusion that Meyer's conduct involved ‘conscious wrongdoing’ and ‘an evil state of mind.’ ”

The only problem with the Government's contention is that the Appellant was not allowed to introduce any evidence to rebut this conclusion, such as Maria Meyers'

his entire defense, must have confused the minds of the jurors when they were determining the sufficiency of the evidence on the question of wilfulness, as discussed in Point I of Appellant's Brief.

testimony that the payments represented a share of her father's estate.

It has already been pointed out that the trial judge ruled quickly against Appellant, indicating his reason, in each of the instances where defense counsel attempted to question Marcelino Fernandez (308A) and Maria Meyers (372A-373A). It should be noted that in these particular instances the trial judge did not ask or provide any opportunity for the defense counsel to explain the possible relevance of his line of questioning, as the trial judge had indeed done for the prosecutor when the Government presented its case with reference to the same \$25,000 loan and its characterization of same as a personal rather than a business bad debt deduction. The trial judge simply said that the proffered evidence "has nothing to do with this case" (373A) and cut off further discussion.*

Plain error has purposely remained an undefined term. It has been left to the appellate courts to delineate just what this elusive concept is with an eye towards upholding the fairness of a criminal proceeding. The most persuasive and telling argument this Appellant can make is that the abridgement of a substantial right—in this case, the opportunity for both parties, the Government and Defendant alike, to present their evidence to the jury, as fully as possible—is plain error. Although Appellant is most certainly not entitled to a perfect trial, he is entitled to a fair one.

* The only case cited by the Government for the proposition that an "offer of proof" may have been required was *United States v. Badalamente*, 507 F.2d 12 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975), a case involving transportation of counterfeited passbooks and certificates of deposit, with facts not immediately relevant here, but where the Second Circuit noted there, as opposed to here, at 21: "The District Court assigned no reason for its ruling" in sustaining the Government's objection.

CONCLUSION

**The Judgment of Conviction Should be Reversed
and the Case Remanded For New Trial.**

Respectfully submitted,

STEIN ROSEN & OHRENSTEIN
Attorneys for Defendant-Appellant
1370 Avenue of Americas
New York, New York 10019
(212) 489-0220

Of Counsel:

MANFRED OHRENSTEIN

On the Brief:

MARC R. LEVENTHAL
LEWIS M. LEFKOWITZ



